The Brookdale Hospital Medical Center & Member of League of Voluntary Hospitals and Homes of New York *and* Local 1199, Drug, Hospital and Health Care Employees Union, Retail, Wholesale, Department Store Union, AFL–CIO, Petitioner. Case 26–UC–149 (formerly 29–UC–371)

November 26, 1993

DECISION ON REVIEW AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On March 27, 1992, the Regional Director for Region 26 issued a Supplemental Decision, attached hereto, in which he reconsidered his earlier Decision and Order,[1] and found, inter alia, that the Employer is the sole employer of the agency-referred respiratory therapists working at the Employer's facility and that the unit should therefore be clarified to include these therapists. The Employer filed a timely request for review.

The Board, having duly considered this matter,[2] grants review solely with respect to the Regional Director's inclusion of the Employer's agency-referred therapists and finds, contrary to the Regional Director, that the Employer and the various referring agencies are joint employers of the referred therapists. Accordingly, under *Greenhoot, Inc*., 205 NLRB 250 (1973), they must be excluded. In all other respects the Employer's request for review is denied.[3]

The undisputed facts in this case are almost identical to those in *Flatbush Manor Care Center*, Case 29–RC–7764, decided March 12, 1992, motion for reconsideration denied August 19, 1993, Member Devaney dissenting (reissued simultaneously at 313 NLRB 591), wherein the Board found a nursing home and the agencies referring licensed practical nurses (LPNs) to the home to be joint employers of the referred LPNs and therefore excluded the LPNs from the bargaining unit comprised solely of the employer's employees.

Applying *Flatbush*, and based on the Regional Director's uncontradicted factual findings, we conclude that the Employer and the agencies referring respiratory therapists to the Employer codetermine their essential terms and conditions of employment and therefore are joint employers of the referred therapists. The referring agencies recruit and hire the referred therapists. Occasionally, the Employer will communicate directly with the therapist after the initial referral rather than go through the referring agency. The Employer and the agencies agree to an hourly fee for the use of the respiratory therapists, but the agencies determine the therapists' hourly wages. The agencies provide workers' compensation; one of the two agencies the Employer primarily used at the time of the hearing makes social security deductions and the other provides state disability insurance. Both the Employer and the agencies are involved in discipline. For example, the agencies discipline the referred therapists when they refuse to work a shift or for repeated tardiness. The Employer may counsel the referred therapists and may request that the agency not send the therapist to the Employer again, but the agency determines whether the referred therapist will be sent to another facility or terminated. The Employer provides its own orientation and decides if it will accept the therapists sent by the agencies. The Employer assigns and directs these employees, establishes labor relations policies applicable to the referred employees, and uses its own supervisors to exercise day-to-day control over the referred therapists. The Employer also determines hours and sets the work schedule. Based on the above, we conclude that the Employer and the referring agencies are joint employers of the referred respiratory therapists.

Contrary to the Regional Director, *Lee Hospital*, 300 NLRB 947 (1990), does not require a different result. There, the Board held that the hospital was the sole employer of certified registered nurse anesthetists (CRNAs) working in the hospital's anesthesia department which was operated by a separate corporation

[1] On December 26, 1991, the Regional Director had issued a Decision and Order Clarifying Bargaining Units in which he found the Employer and the referring agencies to be joint employers of the agency-referred respiratory therapists and included the referred employees in the unit with the Employer's respiratory therapists. Thereafter, on January 3, 1992, the Regional Director issued an Order to Show Cause why the Decision and Order should not be reconsidered in light of recent Board precedent which the parties did not have an opportunity to brief. On review and consideration of the briefs submitted, the Regional Director reconsidered his decision.

[2] In addition to the Employer's request for review, we have also carefully considered the opposition filed by the Petitioner, the memorandum to the Board as amicus curiae of the League of Voluntary Hospitals and Homes of New York, and the statement in support of Petitioner as amicus curiae of the International Brotherhood of Teamsters.

[3] The Regional Director properly found that the UC petition was both timely and adequate. Although the placement of the agency-referred therapists was never raised at the negotiation table, both parties knew, by virtue of the Petitioner's letter requesting inclusion of those employees and the Employer's refusal, that a dispute existed as to the placement of these therapists which was not resolved during negotiations. Thus, the petition, filed shortly after the current contract was consummated, was timely. The absence of an explicit reservation by the Petitioner here of its right to pursue the issue with the Board does not evidence a waiver of this right when it agreed to the contract. *St. Francis Hospital*, 282 NLRB 950 (1987).

The UC petition is adequate even though it does not refer to the League of Voluntary Hospitals, of which the Employer is a member and which bargains for the Employer on certain issues. Under the terms of the League's collective-bargaining agreement, bargaining units are established at the individual employer level in local negotiations. Because the League has not objected to the petition, no other League member has intervened in this case, and the grant of the petition does not require a change in individual unit descriptions of any other employer, the petition referring only to the Employer is adequate. *Peninsula Hospital Center*, 219 NLRB 139 (1975).

(AAI) with whom the employer had a contract. In finding that AAI was not a joint employer of the CRNAs, the Board concluded that the control over critical terms and conditions of employment for the CRNAs rested solely with the hospital. Hiring was normally initiated and approved by the hospital. AAI's hiring of some CRNAs was an anomaly involving either past employees of the hospital or students from the hospital's now defunct school for CRNAs and was inconsistent with the hospital's formal hiring procedure. Only the hospital had the authority to terminate the CRNAs. The hospital set wages and fringe benefits for the CRNAs. Here, by contrast, the referring agencies recruit and hire the respiratory therapists, although the Employer has a right of refusal. The therapists' wages are set by the referring agencies. Although the Employer may refuse to permit a referred therapist to return to the hospital if dissatisfied with her work, it is the agency which decides whether the therapist is terminated or will be sent to another placement. Although, unlike AAI, the referring agencies here do not provide onsite supervision, engage in formulating policy, or assign the referred workers, these factors are not necessary for a joint employer finding; neither are they evidence of a stronger relationship between the hospital and AAI (where no joint employer relationship was found) than is found here between the Employer and the referring agencies. Indeed, in *Lee*, the Board specifically found these factors to be insubstantial: the supervision exercised by AAI through the department's medical director was related to the physician-nurse relationship and patient care issues; policy was implemented only by the hospital; and work assignment generally consisted of placing a CRNA in a particular operating room, a decision that could be changed unilaterally by the hospital.

Having found joint employer status between the Employer and the various agencies with respect to the referred respiratory therapists, we also find that the therapists must be excluded from the unit of the Employer's employees as the Board will not include employees of a joint employer in a unit with employees of a single employer, unless the parties consent. *Greenhoot; Lee Hospital*. Here, the Employer has never consented to the inclusion of the referred therapists in its bargaining unit or agreed to bargain jointly with the referral agencies over the terms and conditions of its employees.[4]

Our dissenting colleague finds that the referral agency is not a ''full fledged employer.'' He does not define this phrase. We prefer to use the term ''joint employer,'' a term that traditionally has been used by the Board and the courts, and one whose principles have been well established over the years.

It is clear that, under these principles, the referral agency is a joint employer of those therapists whom they refer to the hospital. These therapists, by virtue of their referral status, differ from the regular therapists employed solely by the hospital. Our colleague seeks to minimize these differences. He says that ''the only difference between the two groups [the therapists hired by the agencies, and those hired by the Hospital] is how they initially applied for employment at the hospital . . . how much they are paid . . . and who furnishes their weekly paychecks.''

We believe that these very matters—hire and remuneration—are essential terms and conditions of employment.

With further respect to hiring, we recognize that the hospital can reject a referred therapist, and can ask for another. However, this establishes only that both the agency and the hospital must consent before a hiring is accomplished. It seems to us that this joint process is a hallmark of joint employer status.

With particular respect to remuneration, we note that agency therapists receive a higher hourly wage, but no benefits. Given the relationship between the agency and the hospital, it would seem that any demand for change in remuneration could not ignore the referral agency.

Accordingly, the unit involved here is clarified to exclude agency-referred therapists.

MEMBER DEVANEY, dissenting in part.

In my view, the Regional Director correctly found that the agency-referred respiratory therapists are the employees of the hospital alone, and he properly included them in the existing contractual unit. Therefore, unlike my colleagues, I would deny review on all the issues raised by the Employer's request for review.

The Petitioner has historically represented the respiratory therapists working at the hospital.[1] In 1987, the hospital began using therapists referred by an outside agency in addition to its regular staff therapists.[2] The agency therapists currently working at the hospital were originally furnished by Ultracare and Midpoint Health Care Services, Inc. In return for a set hourly fee negotiated with the hospital, these two agencies have contracted to refer therapists and perform certain ad-

[4] Chairman Stephens agrees that this conclusion is in accord with Board law, but he notes that over the last decade health care employers have increasingly utilized contract labor to perform work formerly done by their permanent work forces. See Hiatt & Rhinehart, *The Growing Contingent Workforce: A Challenge for the Future* (paper presented to the ABA Section on Labor & Employment Law Annual Meeting (Aug. 10, 1993)), pp. 5–6. In light of these changes in working conditions, it may be appropriate for the Board at some point to reexamine the continuing validity of *Greenhoot*.

[1] For over 25 years, the hospital and the Petitioner have had a collective-bargaining relationship.

[2] At the time of the hearing, the hospital employed 34 staff therapists and 9 agency-referred therapists.

ministrative and personnel functions associated with those referrals. The agencies do administrative paperwork, skill qualifying, interviewing, reference checks, and verification and payroll services including making deductions for taxes, workers' compensation insurance, and state disability and unemployment insurance. Unlike my colleagues, I am not willing to find that those routine administrative and personnel functions have transformed Ultracare and Midpoint from employment referral agencies into full-fledged employers of the agency therapists working at the hospital.

As found by the Regional Director, the agency therapists' contact with the referral agencies, except for their paychecks, essentially ceased when they began working for the hospital. No onsite representative of either referral agency is present at the hospital to handle these individuals' work questions, problems, or complaints. Rather, it is the hospital alone which assumes this role. The hospital, and not the referral agency, is the entity that actually controls the essentials: whether, when, where, and how the agency therapists will be utilized at the hospital

My colleagues do not dispute the Regional Director's factual findings reflecting the almost identical symmetry of the staff and agency therapists. Both groups perform the same job duties with the same hospital equipment and supplies. They have identical job descriptions, supervision, and work hours and schedules. They are subject to the same work rules and company policies. Like the staff therapists, the agency therapists submit any requests for time off to the hospital's supervisors, and they can be counseled, disciplined, and terminated by the hospital for inappropriate conduct.

The only difference between the two groups is how they initially applied for employment at the hospital, how much they are paid based on the timesheets prepared by the hospital, and who furnishes their weekly paychecks. The staff therapists apparently submitted their applications directly to the hospital, whereas the agency therapists took the other route via the referral agencies. Unlike the staff therapists, the agency therapists receive a higher hourly wage, but no fringe benefits. They also receive their paychecks from the referral agencies, while the staff therapists are directly paid by the Employer.

In *Lee Hospital*, 300 NLRB 947, 948 (1990), relied on by the Regional Director, the Board recently reaffirmed the governing principles for establishing joint employer status. The Board stated that

> [t]he appropriate standard for determining joint employer status is whether two separate entities share or codetermine those matters governing the essential terms and conditions of employment. Further, to establish such status there must be a showing that the employer meaningfully affects matters relating to the employment relationship such as hiring, discipline, supervision, and direction. [Case citations omitted.]

Although *Lee Hospital* did not involve an employment referral agency's relationship to the employees of its customer, my colleagues and I agree that it squarely focuses on what the critical inquiry should be in this kind of situation.[3] Hiring, discipline, supervision, and direction are the key indicators. Interviewing the employees, checking their prior work references, and preparing their paychecks is not sufficient to establish joint employer status. See, e.g., *Storall Mfg. Co.*, 275 NLRB 220 fn. 3 (1985). We also agree that the referral agencies here do not have or exercise any responsibility or control in terms of the supervision and direction of the agency therapists. The hospital alone assigns and directs the agency therapists, establishes the labor relations policies applicable to them, and uses its own supervisors to exercise day-to-day control over them. However, we disagree over whether the referral agencies have a meaningful role in terms of hiring and disciplining the referred therapists. In my view, the answer is clearly no.

My colleagues find that the referral agencies ''hire'' the agency therapists and can ''discipline'' them. However, the evidence does not support their finding. With respect to hiring, the agency does the initial screening of applicants and the necessary paperwork associated with this process. But, the hospital management also interviews the applicant, conducts the job orientation, and alone makes the final hiring decision which cannot be overridden by the agency. Thus, the agency's service to the hospital is not significantly different from the tasks routinely done by a supervisor of a company's own personnel department or by a separate headhunting company who is interested in sending its clients possible candidates for hire. Regarding the discipline of agency therapists, there is no indication that the agency can punish an agency therapist for any work rule infractions at the hospital. Even in the case of a refusal to work or repeated lateness, it is the hospital which decides to terminate its relationship with the therapist if he is to be fired. The agency does not have the prerogative to remove him if the hospital protests. All that the agency can do is restrict its future referrals of that individual or remove him from its referral lists. This has nothing to do with that therapist's employment at the hospital. The agency's ability to affect the therapist's employment elsewhere is irrelevant to whether the agency ''share[s] or co-determine[s] the

[3] In that case, the hospital was found to be the sole employer of the certified registered nurse anesthetists working in the hospital's anesthesia department despite the fact that the hospital had contracted with an independent outside professional corporation, Anesthesiology Associates, Inc. (AAI) to be responsible for some of the supervisory and managerial functions in that department.

matters governing the essential terms and conditions of employment'' at the hospital.

Thus, applying the joint employer standard set forth in *Lee Hospital*, I would find no joint employer status between the employer and the various agencies with respect to the referred respiratory therapists. Accordingly, I would affirm the Regional Director's Supplemental Decision.

APPENDIX

SUPPLEMENTAL DECISION

On December 26, 1991, I issued a Decision and Order Clarifying Bargaining Units in which it was determined that the bargaining unit for the Employer should be clarified to include agency-referred respiratory therapists who exceed the contractual definition for exclusion, i.e., those agency-referred therapists who regularly worked at the Employer in excess of 1 workday a workweek.

Subsequently, on January 3, 1992, I issued an Order to Show Cause why the Decision and Order should not be reconsidered in light of recent Board precedent which the parties did not have an opportunity to brief. All interested parties have had the opportunity to submit additional briefs.[1] On review and consideration of the briefs submitted, I have decided to reconsider my Decision and Order Clarifying Bargaining Units as set forth below.

In *Lee Hospital*, 300 NLRB 947 (1990), the Board declined to find a joint employer relationship under circumstances parallel to those here. In view of the Board's decision in *Lee Hospital* and in reconsideration of facts presented in the instant case, I have decided to reverse my original finding and conclusion regarding the joint employer finding. I now conclude the agency-referred therapists are employees of the Employer and the unit should be clarified to include them on that basis alone.

In reconsideration of the earlier decision, I have extensively reviewed the lengthy transcript for any additional indicia regarding the employee status of the agency-referred therapists. The record reflects that at the time of the hearing the Employer mainly utilized therapists originally referred by the Ultracare and Midpoint Health Care Services, Inc. (Midpoint) agencies. At the time of the hearing, the Employer and Midpoint were operating under a written agreement effective for the period from April 1990 through March 1991. This agreement provided that the referred therapists were employees of Midpoint, that Midpoint would deduct Federal and state payroll taxes and provide workers' compensation, state disability, and unemployment insurance. The agreement leaves to the Employer the responsibility of establishing guidelines necessary for performance including establishing hours of work, vacation, holiday and sick leave, and notice requirements in conjunction with the absence of personnel.

There is no written agreement between Ultracare and the Employer. Under their arrangement the referred therapists are considered employees of Ultracare, who deducts all taxes from the referred therapists' pay. Also Ultracare is responsible for certain licensing requirements, liability and workers' compensation insurance, health exams, and that the therapists meet certain professional qualifications. Ultracare does not provide unemployment insurance.

Except for determining the amount of pay due agency-referred therapists from the timesheets maintained by the Employer and distributing the pay checks, the record does not demonstrate any additional responsibilities the agency exercises with respect to the therapists who are regularly used by the Employer, with respect to that employment.

In view of the above, and the information contained in my initial decision, it appears clear that in applying the Board's decision in *Lee Hospital* a joint employer relationship does not exist between the Employer and the referral agencies. Joint employment is a status resulting from an interpretation of law as assessed by the Board. It is a conclusion of law reserved to the Board. In comparison, the relationship between the subcontractor in *Lee* (AAI) and the employees in issue (CRNAs) is much greater than the relationship between the agencies and the referred therapists. Thus, AAI was responsible for the supervision and evaluation of the CRNA's clinical performance on a daily basis. Representatives of AAI controlled the decisions regarding the daily work assignments, i.e., attendance, lunch and work breaks, and the length of the workday for CRNAs. Representatives of AAI were also involved in formulating policies regarding other terms and conditions of employment such as vacation policies, reducing scheduled work hours, department time schedules, overtime compensation, and job qualifications. Representatives of AAI also had the authority to discipline and transfer CRNAs and participated in the hiring process. However, the Board found that officials of Lee Hospital had primary responsibility for administrative and personnel matters, including preparing work schedules, making regular overtime assignments, and determining the number of CRNAs to report to work. Hospital officials could also change the assignments of AAI without consultation. Among other things, hospital officials scheduled vacations and handled requests for nonemergency leave. The Board ultimately concluded the hospital determined the essential terms and conditions of employment and labor relation policies for the CRNAs. Thus, the Board found no joint employer relationship and concluded the CRNAs were employees of the hospital.

In reviewing the relevant record evidence in the instant case, I find and conclude that the agency-referred therapists in issue are employees of the Employer. Thus, as noted in my initial decision, for those agency-referred therapists regularly used by the Employer, contact with the agency essentially ceases with the Employer's decision to utilize the therapists referred. Afterwards, all matters concerning scheduling of the therapists, job and area assignments, supervision, scheduling time off from the Employer, granting emergency or unexpected time off from the Employer, and discipline and retention by the Employer are controlled solely and exclusively by representatives of the Employer. Although the contract with Midpoint and arrangement with Ultracare provides that the therapists are employees of the agencies, this assignment is not controlling before the Board. The determination of employee status is not left to the self-serving agreements of the parties. Accordingly, on further reconsideration, I find and conclude that the relationship between the Employer and the referral agencies is similar to that found

[1] Service Employees International Union, AFL–CIO, CLC and the League of Voluntary Hospitals and Homes of New York filed amicus briefs.

by the Board found existed in *Storall Mfg. Co.*, 275 NLRB 220 (1985). Thus, the referral agencies are agents of the Employer in providing the therapists used by the Employer to perform unit work. As part of their function, the agencies provide services such as administrative paperwork, skill qualifying, interviewing, reference, verification, payroll and insurance related to the referred employees.

Accordingly, having found the agency-referred therapists in issue are employees of the Employer, I conclude the contractual unit should be clarified to include the therapists who exceed the contractual definition for exclusion from the bargaining unit.[2]

[2] Under the provisions of Sec. 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the Board in Washington, D.C. This request must be received by the Board in Washington by April 10, 1992. Any party may waive its right to request review by signing the attached waiver form and submitting it to the Board in Washington with a copy to the Regional Director.